

# Army's Civil Works Regulatory Program

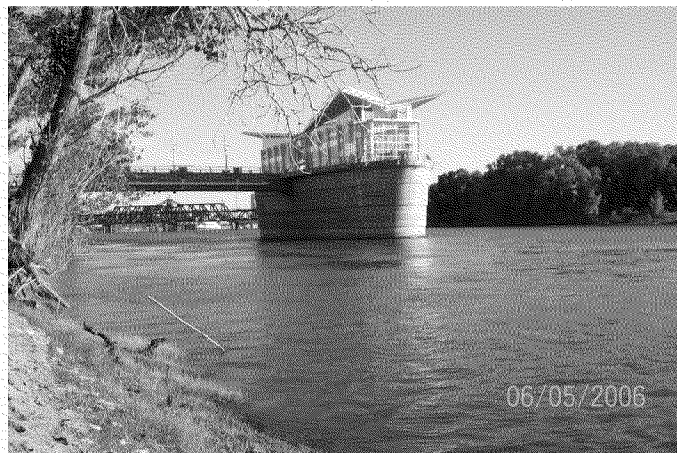
Rivers and Harbors and Clean Water Acts



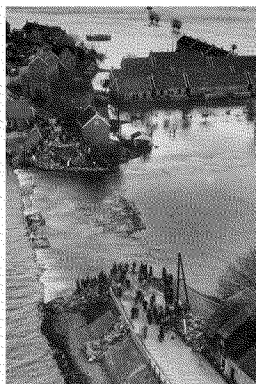
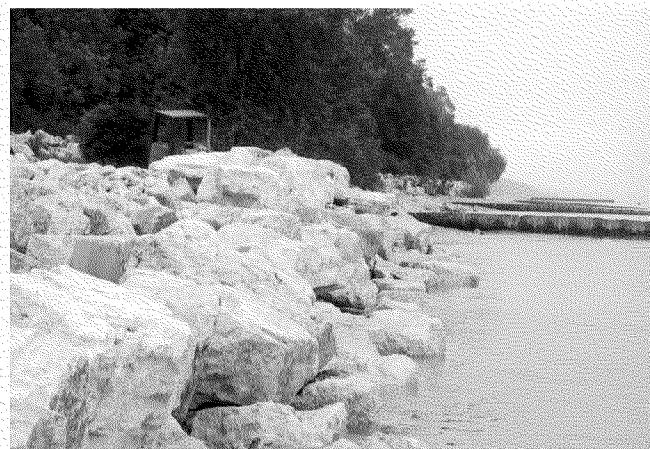
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# Applicable USACE Authorities

Section 10 Rivers and Harbors Act (RHA) – Structures and Work in Navigable Waters



Section 404 Clean Water Act (CWA) – Discharge of dredged and fill material



Section 14 Rivers and Harbors Act (RHA) – Modifications to Federal flood control projects (this referred to as section 408)



# CWA

## A Short History

- \* 1972 Enacted
- \* 1974 Regulation
- \* 1975 NRDC vs.. Calloway. Interim regulation
- \* 1977 Regulation & Congressional Amendments
- \* 1979 Civiletti decision
- \* 1985 Riverside v. Bayview Homes
- \* 1986 Preamble on “Migratory Bird Rule”
- \* 1993 “Tulloch Rule”
- \* 1998 Overturn “Tulloch Rule”
- \* 2001 Supreme Court decision in SWANCC v. USACE
- \* 2003 ANPRM & Rulemaking
- \* 2004/5 GAO reports
- \* 2006 Rapanos & Carabell U.S. Supreme Court cases

# Key Regulations & Policies

- \* 33 CFR 320-331 – Corps permit regulations
- \* Appendix B of 33 CFR 325 (1988) - NEPA
- \* 40 CFR 230 – EPA's Clean Water Act Section 404(b)(1) Guidelines [*Least Environmentally Damaging Practicable Alternative*]
- \* 40 CFR 220-229 – EPA's Ocean Dumping Criteria
- \* 50 CFR 402 - Endangered Species Act
- \* 36 CFR 800 – National Historic Preservation Act
- \* Coastal Zone Management Act
- \* Magnuson-Stephenson Act – Essential Fish Habitat



# Regulatory Program Mission

To protect the Nation's aquatic resources, while allowing reasonable development through fair and balanced permit decisions.

The Corps is mandated by law to protect the aquatic environment by requiring a permit for virtually all physical impacts to the Nation's waters, including coastal waters, all open waters, and wetlands.

The Corps goal in administering its regulatory mission is to make timely, fair, and reasonable decisions.

# Key Principles & Concepts

- District Engineers make permit decisions
- No interference with DE decision making
- Corps is neither a proponent nor an opponent of proposed activities
- Balanced, transparent, multi-perspective, reasonable, and timely permit decisions
- Small-routine to large-highly visible projects, and sometimes complex and controversial projects
- Corps works with applicants to avoid and minimize impacts to aquatic resources, and compensate for unavoidable losses

# Corps Asserts CWA Jurisdiction Over...

- Traditional navigable waters (TNW)
- Interstate waters (IW)
- Wetlands adjacent to TNWs or IWs
- Tributaries to TNWs or IWs with “significant nexus determination”
- Wetlands adjacent but not directly abutting jurisdictional tributaries to TNWs or IWs with “significant nexus determination”
- Non-navigable tributaries to TNWs that are relatively permanent, meaning at least seasonal flow
- Isolated waters (intrastate), including wetlands where they have a significant nexus to interstate or foreign commerce (only with HQ approval – none approved thus far)



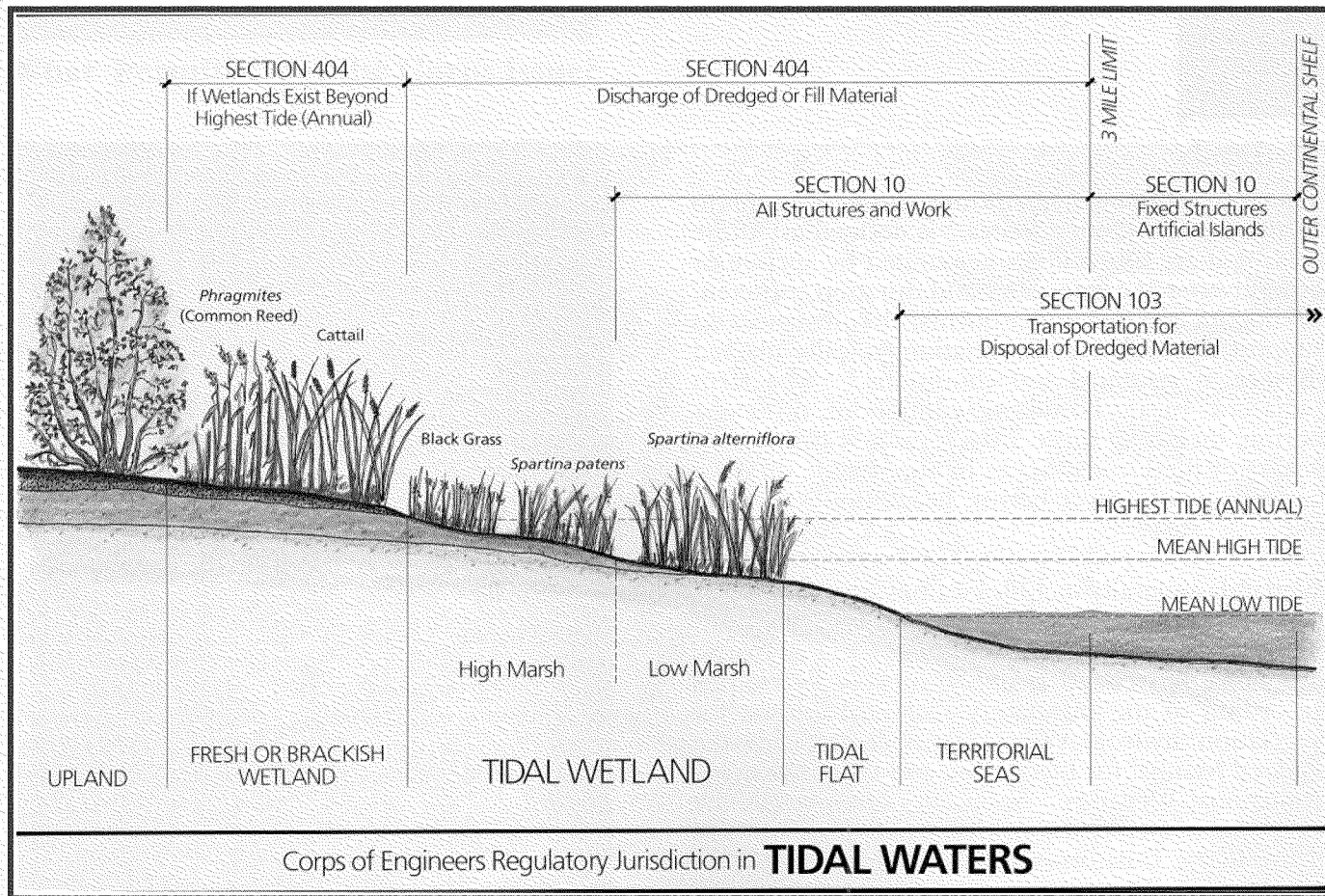
# Waters of the U.S. May Be...

- \* Perennial, intermittent, or ephemeral streams
- \* Wetlands adjacent to tributary systems (bordering neighboring, contiguous)
- \* Lakes and reservoirs
- \* Mud flats, playa lakes, prairie potholes, vernal pools (with a significant nexus to a Traditional Navigable Water)
- \* Coastal areas and their aquatic features

# Waters Generally NOT Subject to CWA Jurisdiction

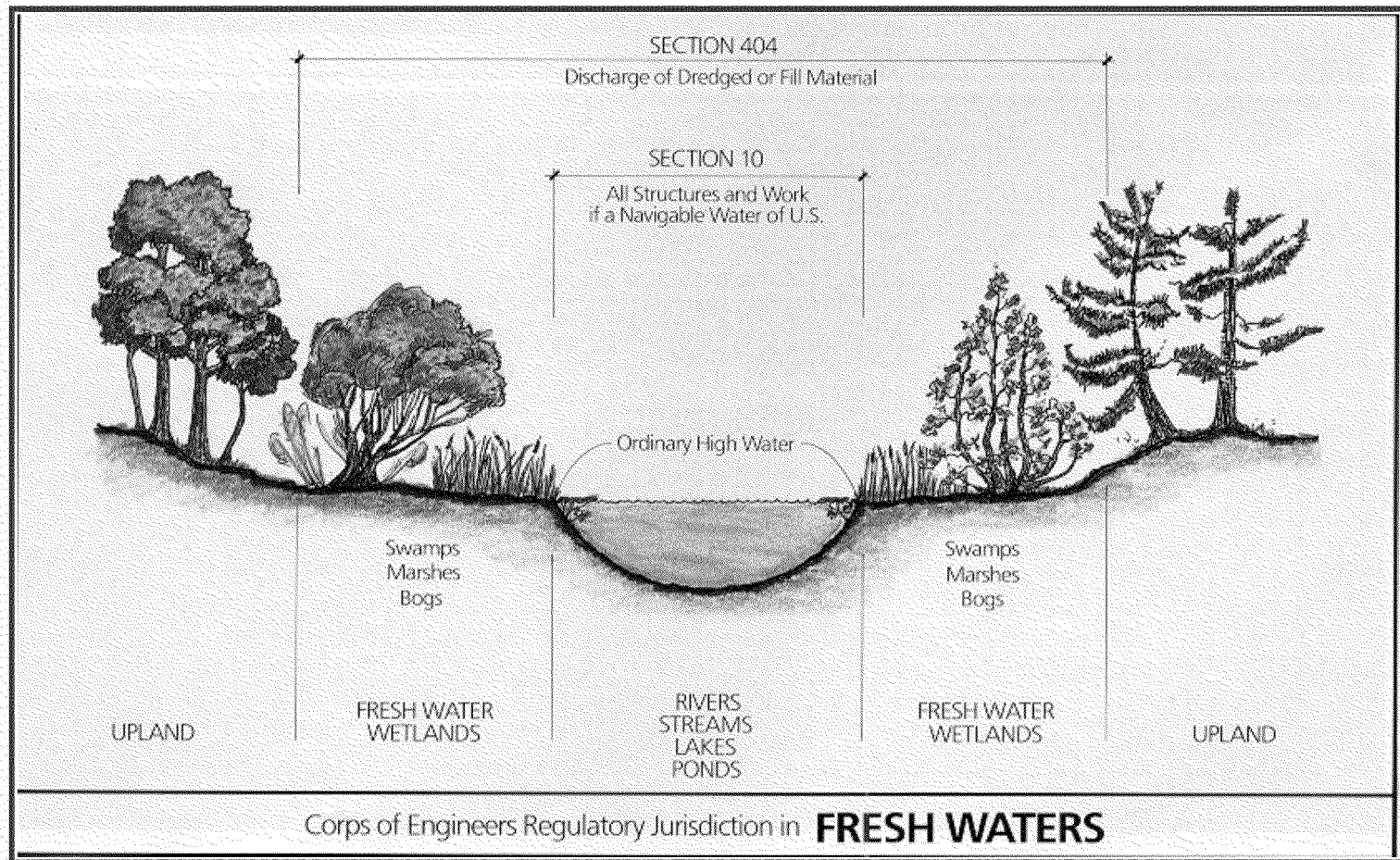
- Wet areas that are not tributaries or open waters or do not meet the agencies regulatory definition of “wetlands”
- Waters that lack a “significant nexus” where one is required for CWA jurisdiction to apply
- Artificially irrigated areas that would revert to upland should irrigation cease
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, rice growing
- Artificial reflecting, ornamental, or swimming pools created by excavating and/or diking dry land
- Water-filled depressions created incidental to construction activity

# CWA Jurisdiction Tidal Waters





# CWA Jurisdiction Fresh Waters



## Regulatory Guidance Letter 08-02

- Defines Preliminary Jurisdictional Determinations and Approved Jurisdictional Determinations and when to use them
- AJD=7 page form; PJD=2page form
- Record both PJDs and AJDs in ORM2 data base
- PJDs are used ~80-85% of the time, saving time for the government and applicants
- Use PJD and AJD information to account for Program expenses in budget formulation
- **Voluntary**

# Standard Individual Permits

- \* Project specific evaluation & authorization
- \* Process involves public notice, public comment period, hearings
- \* NEPA & Public Interest Review – all permit actions
- \* Section 404(b)(1) Guidelines – all 404 actions
- \* Decision-Making
- \* Corps determines compliance with criteria
- \* Criteria applied on all permits
- \* Corps prepares NEPA documents for each permit decision (environmental assessment (or EIS) and statement of findings)



# Standard Permit Review

## 404(b)(1) Guidelines (40 CFR 230.10(a)-(d))

- Analysis only on 404 permits
- Pass fail tests (CORPS DECIDES ALL TESTS)
- (a) least environmentally damaging, practicable alternative
- (b) other laws (e.g., ESA, 401, Marine Sanctuaries)
- (c) significant degradation (net after mitigation)
- (d) all appropriate and practicable means to reduce impacts (e.g., construction time constraints, compensatory mitigation)

# 20 Public Interest Criteria

- Conservation
- Economics
- Aesthetics
- General Environmental Concerns
- Wetlands
- Historic Properties
- Fish and Wildlife Values
- Flood Hazards
- Floodplain Values
- Land Use
- Navigation
- Shore Erosion and Accretion
- Recreation
- Water Supply and Conservation
- Water Quality
- Energy Needs
- Safety
- Food and Fiber Production
- Mineral Needs
- Property Ownership

# Purpose of Public Interest Review Factors for Standard Individual Permits

- \* Needs and welfare of the people
- \* Performed on all Standard Individual Permit decisions
- \* Balance benefits against detriments to public
- \* Corps typically authorizes projects unless they are contrary to the public interest.



# Key Concepts & Requirements

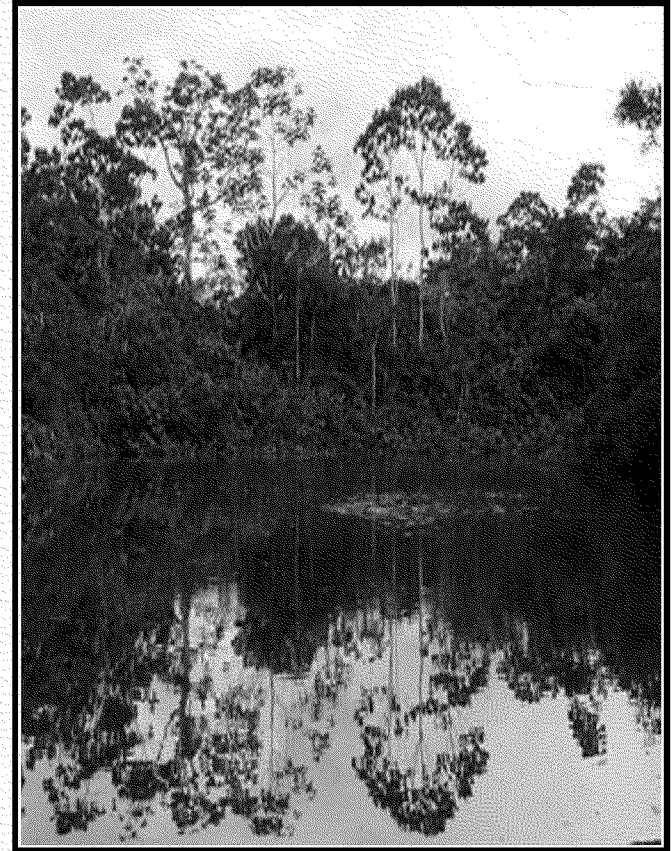
- \* Basic Project Purpose –is the fundamental purpose of the proposed project
- \* Overall Project Purpose – is more specific and defines the applicants need
- \* 404(b)(1) Guidelines – purpose is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.
- \* Least Environmentally Damaging Practicable Alternative (LEDPA) is determined by the Corps
- \* Sequencing – Avoidance, Minimization, and Compensation

# General Permits (GP)

- \* Types of General Permits
  - \* Nationwide permits (NWP)-issued by Corps HQ
  - \* Regional permits (RGP)-issued by districts and divisions
  - \* Programmatic permits (PGP)-reduce duplication
- \* GP Facts
  - \* Evaluation and authorization not project-specific
  - \* Similar activities resulting in minimal adverse effects to aquatic environment (with mitigation)
  - \* Developed and issued with same process as IPs
  - \* Must be reissued every five years

# More GP Facts

- There are 50 NWP's
- Water Quality Certification may be required
- Coastal Zone Management may be required
- Pre-Construction Notification may be required
- Subject to Discretionary Authority meaning the Corps can chose to require a Standard Individual Permit



# Mitigation Rule - Key Policy Tool

- References - NRC Report and aspects of current regulations & guidance integrated into this rule
- Goal – level playing field (permittee, Mitigation Banks, ILFs) to the maximum extent practicable
- Performance Standards – ecologically-driven, equivalent/effective standards, best available science
- Compliance – increase compliance visits, establish enforceable success criteria, prescribed monitoring reports
- Mitigation Sequence Preserved - avoid, minimize, compensate for unavoidable impacts and lost aquatic functions
- Process – set time frames (total 225 days), IRT reviews/advises, DEs decide



# What the BDCP Doesn't Need USACE Approval For:

- Finalizing the HCP/NCCP for the BDCP
- Finalizing the EIS/EIR for the BDCP
- Signing of a ROD and Issuance of a Section 10 permit under ESA by the USFWS
- Signing of a ROD and Issuance of a Section 10 permit under ESA by the NMFS
- Signing of a NOD and Issuance of a Permit under the NCCPA by DFG
- Signing of a ROD to implement the BDCP by BOR
- Signing of a NOD to implement the BDCP by DWR

# What the BDCP Doesn't Need USACE Approval For:

- \* Approval by the State Water Resources Control Board (SWRCB) to change a water right
- \* Approval by the SWRCB to change a point of diversion
- \* Continued operations of the CVP
- \* Continued operations of the Mirant Delta LLC power plants
- \* Implementation of Governance, Funding and Authorizations needed to undertake the BDCP
- \* Acquisition of lands

# What the BDCP Does Need USACE Approval For:

- \* Modification of Federal Flood Control Projects
  - \* Proposed BDCP habitat restoration projects are nearly all on or adjacent to Federal flood control bypasses or levees
- \* Construction of New Facilities
  - \* New diversion facilities
  - \* New conveyance facilities (pipeline or tunnel)
  - \* New barriers throughout the Delta waterways
  - \* Modifications of Delta channels (depth, width, flows)
  - \* New monitoring and research structures
  - \* Conversion of freshwater wetlands to tidal wetlands

# What the BDCP Does Need USACE Approval For:

- \* Operations of New Facilities
  - \* The diversion of waters from the new diversion facilities subject to USACE jurisdiction under Section 10 of RHA
- \* Continued Operation of the SWP
  - \* The diversion of waters from the existing SWP diversion on CCF would continue to be subject to USACE jurisdiction under Section 10 of RHA



# USACE Use of the BDCP EIS/EIR

- \* May use the BDCP EIS/EIR for permit decisions IF:
  - \* they have a complete application for a permit for a specific project(s), and;
  - \* the EIS/EIR contains all of the information USACE deems necessary at a project specific level of detail for the specific project(s), and;
  - \* the state of the science/understanding of impacts underlying the BDCP has not substantially changed from the EIS/EIR by the time of our permit process.
- \* May also use the BDCP EIS/EIR as a reference document for USACE actions within the Delta.
- \* If the EIS/EIR is unsuitable, USACE would have to supplement or make a new EIS for permit decisions.

# Challenges - BDCP EIS/EIR

- \* Who is in charge? 4 lead agencies, 3 consultants, 2 groups of water contractors
- \* Lead Agency focus is entirely (100%) on ESA/NCCPA issues. This is somewhat understandable as without solution on species issues, there is no BDCP.
- \* Lead agency staff and management in Sacramento and DC have little to no (really no) understanding of USACE 10/404 regulatory requirements, and absolutely no understanding of USACE 408 regulatory requirements.
- \* The Lead Agencies have not designated any individual or group as USACE point(s) of contact for permitting and NEPA issues. DWR is staffing a team for this.
- \* The Lead Agency individuals who are willing/able to meet with USACE lack a detailed understanding of the projects within the BDCP, and therefore have not been able to provide useful information.
- \* The designing of components of the BDCP are being undertaken without any consideration of USACE permitting requirements, including our section 408 requirement that there be no adverse impact to a Federal flood control project
- \* No specific project or projects for USACE permitting presently defined

# Challenges - BDCP EIS/EIR

- \* No applicant for USACE permits presently identified
- \* The Lead Agencies have not allowed USACE to see any portion of the EIS/EIR
- \* The Lead Agencies have not allowed USACE to see any portion of any analysis of impacts to anything
- \* The Lead Agencies want USACE approvals, prior to beginning our regulatory processes.
- \* USACE attempts to remedy the above have been met with increasing levels of indifference and hostility by BOR and the Department of the Interior, making it an increasing challenge to work with them on preparing the EIS/EIR for our permit decisions.
- \* EPA has a number of concerns on the direction of the NEPA document, particularly with Purpose and Need, and the range of alternatives, based upon their understanding of what is going to be in the EIS/EIR which they have also not been allowed to review.

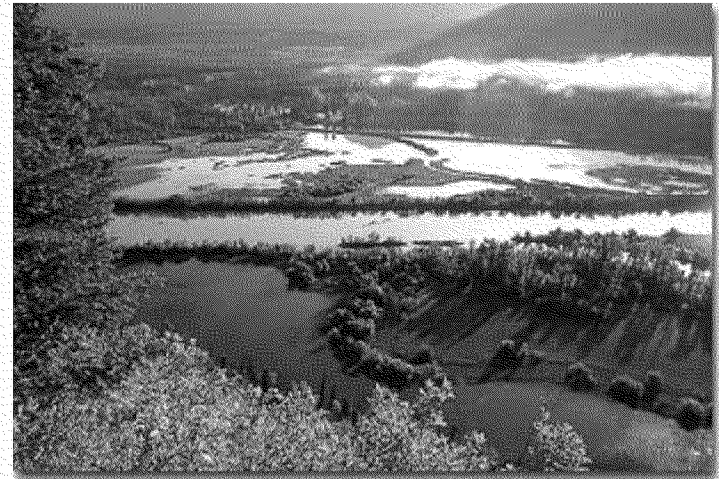
# USACE Way Forward

## (RHA & CWA Permit Decisions only)

- \* SPK is developing a 6-Agency NEPA/CWA/RHASEC10/RHASEC408 Integration Process MOU for the BDCP
- \* RHA sec 408 is administered by SPK Operations. They have been working very closely with SPK Regulatory, with Regulatory as the lead for BDCP.
- \* USACE internal coordination (SPK-SPN-SPD-HQ) continues to grow and improve
- \* SPK-DWR coordination continues to grow and improve
- \* DWR is staffing a permit coordination group, specifically to work with SPK, which would detailed SPK-DWR discussions on permit processes to commence
- \* SPK is advocating to expand WRDA 2000, Sec 214 funding with State in order to have dedicated staff for the BDCP and its many parts.
- \* At present, the State has not indicated if they would participate.



# Questions?



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# No Universal Scope of Analysis Rule

- \* Each project analyzed on its specific facts considering:
  - \* How much cumulative federal control and responsibility?
  - \* Do the regulated activities comprise a substantial portion of the project?
  - \* How much of the entire project is within Corps jurisdiction?
  - \* Does the independent utility test apply to project phases?
  - \* Is the regulated activity a link in a corridor-type project?
  - \* Do the upland aspects directly affect the location and configuration of the regulated activity?

# When to Consider “*Expanded*” NEPA Scope of Analysis

- \* When no development could occur in uplands without a 10/404 permit
- \* When construction of the overall project is dictated by the inextricable inter-connectedness of activities within and outside of jurisdictional waters
  - \* Lines on graph paper
  - \* Like capillaries

